United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1335

To be argued by
ARMENDE LESSER

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P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1335

UNITED STATES OF AMERICA,

Appellee,

v.

PETER VARIANO, HENRY BUCCII, ANTHONY RUSSILLO, MICHAEL DeMICHAELS, JOHN MONACO, and MICHAEL EVANGELISTA,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANT-APPELLANT JOHN MONACO

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The Government's argument in support of the conviction is predicated upon (a) guilt by association (11, 19, 24)* and (b) the validity of the stop and seizure of September 3, 1974, and the fruits of the search (4,30-32).

(a) The Government relies exclusively on the testimony of F.B.I. agents Trotta and Reutter and their surveillance of September 3, 1974 and December 13, 1974, identifying Monaco and placing him with three of

*Refers to brief for the United States of America.

the defendants in this case. It argues (24), "(h)is presence there with Evangelista, Murty and Picciano was made even more significant by the evidence that each of those three persons was later searched and found to be in possession of numbers, waivers, collected by various runners." Monaco was neither searched nor otherwise connected with the three named persons. His mere presence was not enough to support the finding of guilt.

This court has consistently held that mere association is not enough for conviction (United States v. Cirillo, 499 F 2d 872, 883 [1974]; United States v. Johnson, 513 F 2d 819 [1974].)

> ...mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed. Compare United States v. Amino, 321 F. 2d 509 (2d Cir. 1963), cert. denied, 375 U.S. 974, 84 S. Ct. 491, 11 L.Ed 2d 418 (1964)("mere meeting was no evidence [that persons were] conspirators") and United States v. Fantuzzi, 463 F. 2d 683 (2d Cir. 1974) with United States v. Cassino, 467 F. 2d 610 (wd Cir. 1972), cert. denied, 410 U.S. 913, 93, S.Ct. 959, 35 L.Ed. 2d 276 (1973).*

The identification made by the Federal agents

*United States v. Cirillo, supra, at page 883

is likewise suspect. The surveillances were made toward the end of 1974. The logs referred to the participants solely by sex and color; yet, some eighteen months later Monaco was named as one of the men present at the scene. Despite the fact that the agents took many photographs, which were introduced in evidence, not one reveals the identity of Monaco nor a man "carrying a brown paper bag." (footnote, p. 11)

(b) The validity of the initial encounter must be considered first. "In judging the legality of a search, courts must apply an objective standard and will not be bound by the 'subjective beliefs of the arresting officer [or] the assistant district attorney at trial'."*

There is no question on this record that the initial encounter resulted from Trotta's recognition of Monaco as a principal in an arrest that took place approximately three months earlier. He reacted by stopping the automobile on the public highway without probable cause, solely on impulse. "The reason (he) stopped the car was because (he) saw this man, recognized him and felt that--didn't believe he had a license." (Carter, J., Minutes 70a)

*In United States v. Jenkins, 496 F 2d 57, 72 (2d Cir., 1974)

The evidence further reveals that the Monaco automobile was proceeding in front of the police car so that Trotta could not observe the cracked windshield prior to the intial stop. The Government conveniently reversed the sequence of events by attributing the stop to the cracked windshield (4) when in fact Trotta recognized Monaco and, as revealed in this record, decided to investigate despite the lack of probable cause or even founded suspicion for investigatory detention. (United States v. Janinie-Barros, 494 F 2d 455, 9th Cir. 1974)

"The requirement of the evidence of probable cause to validate a search is delineated in the following language of the Supreme Court in United States v. Ortiz, 422 U.S. 891, at 896, 95 S.Ct. 2585, 2588, 45 L.Ed. 2d 622 (1975):

> [Some degree of discretion] to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search. Almeida-Sanchez v. U.S., 413 U.S. 266 (1973)],

at 269-270, 93 S.Ct. [2535] at 2537-2538 [37 L.Ed. 2d 596]; Chambers v. Maroney, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970)."*

The proper test is not whether the conduct of the car itself was "consistent with innocent behavior," but rather whether the officers were reasonable, under all of the circumstances, in believing that the car, or its occupants, were involved, or about to become involved in criminal activity. (United States v. Halland, 510 F.2d 453, 455, 9th Cir. 1975; United States v. Brignoni-Ponce, 422 U.S. 873, 879-880; 1974).

*United States v. Portillo-Reyes, 529 F 2d 844, 848, 9th Cir., 1975; rehearing and rehearing en banc denied 4/2/76, cert. denied Oct. 1976. The authorities cited in the Government's brief (p. 31, footnote) fully support the illegality of the stop and search of September 3, 1974, and justify the suppression of the seized evidence. United States v. Jenkins, 496 F2d 57, 72, the court: "Furthermore in the present case we are not dealing with a routine traffic arrest. Here there was probable cause to believe that the motor cycle was stolen." United States v. Riggs, 474 F2d 699 (2d Cir.) stated that the "justification for such an intrusion is the probable cause to believe that the individual has committed a crime and the immediate action to prevent the use of weapons against arresting officers or destruction of evidence of crime." In Welch v. United States, 365 F2d 214, the car was stopped because the driver's head was leaning over the left side, "looked like he was either asleep or drunk"--was driving very slow on the highway so that "arresting officer had reasonable grounds for stopping the car (p. 215)." [Emphasis supplied.]

Trotta had neither probable cause nor founded suspicion to intrude into the privacy of the automobile. Under all the circumstances, his search and seizure was the arbitrary interference with Monaco's individual right to personal security prohibited by the Fourth Amendment. The subsequent intrusion by the police officer in the automobile, under the circumstances, was arbitrary and violated the fundamental rights of this defendant.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of conviction be reversed.

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11/22/76

Original Letter - mailed
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